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No. 90-237

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

ORSCHELN BROTHERS TRUCK LINES, INC., ET AL.,
PETITIONERS

v.

ZENITH ELECTRONICS CORPORATION f/k/a
ZENITH RADIO CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Interstate Commerce Commission's determination that a motor common carrier should be denied recovery of its tariff rate, because of its unreasonable practices in failing to file the negotiated rate originally charged, is compatible with the Interstate Commerce Act and the "filed rate" doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 899 F.2d 642. The opinion of the district court (Pet. App. 14a-49a) is reported at 708 F. Supp. 845.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1990. A petition for rehearing was denied on May 9, 1990. Pet. App. 12a-13a. The petition for a writ of certiorari was filed on August 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Between 1981 and 1983, petitioner Orscheln Brothers Truck Lines, Inc., a motor common carrier, transported goods for respondents. On October 11, 1985, Orscheln filed an action against respondents in the United States District Court for the Northern District of Illinois seeking to collect freight charges arising out of respondents' shipments. Orscheln alleged that respondents had not paid the full tariff rate required by Orscheln's filed tariffs. Following Orscheln's bankruptcy, petitioner Carriers Traffic Service, Inc. purchased Orscheln's cause of action. Pet. App. 15a, 17a.

Respondents defended by claiming that the collection of the alleged undercharges would constitute an "unreasonable practice" in violation of 49 U.S.C. 10701(a). Acting on respondents' motion, the district court stayed the undercharge action and referred to the Interstate Commerce Commission the issue whether the alleged unreasonable practice constituted a defense. On October 29, 1987, the Commission issued a declaratory order holding that the collection of Orscheln's filed tariff rates, where other rates had been negotiated but had not been properly filed, would constitute an unreasonable practice under the circumstances. In so holding, the Commission relied on its decision in *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986) (*Negotiated Rates*). Pet. App. 15a, 17a-18a, 52a-69a.

Following that decision, the district court granted partial summary judgment to Orscheln with respect

to certain of its undercharge claims.[1] Disagreeing with the Commission, the court held that the *Negotiated Rates* policy was contrary to law because it conflicted with the "filed rate doctrine," under which the filed tariff rate prevails over a rate negotiated by the parties. Pet. App. 38a-49a. The court of appeals reversed.[2] *Id.* at 1a-11a. The court upheld the Commission's *Negotiated Rates* policy as a permissible exercise of the ICC's power to define and regulate unreasonable carrier practices. The court reasoned that *Negotiated Rates* did not contravene the filed rate doctrine, but rather "modified a Commission-made doctrine by holding that the carrier who leads the shipper to believe that there was a tariff on file covering the agreed shipment at the agreed price will be estopped to contend otherwise—will in other words be guilty of an unreasonable practice." *Id.* at 8a.

DISCUSSION

In *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), this Court reviewed the validity of the ICC's *Negotiated Rates* policy and held that it "rests on an interpretation of the [Interstate Commerce] Act that is contrary to the language and structure of the statute as a whole and the require-

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[1] The court also denied summary judgment to Orscheln with respect to undercharge claims based on the absence of a required notation from certain bills of lading. Pet. App. 49a. The court agreed with the Commission's determination that enforcement of the notation requirement would be unreasonable in the circumstances of this case. *Id.* at 22a-35a.

[2] The ICC had intervened in the district court in support of its declaratory order and had filed an appeal from the district court's judgment to the extent it rejected the ICC's determination. Pet. App. 2a.

ments that make up the filed rate doctrine in particular." *Id.* at 2768. In this case, which was decided before this Court issued its opinion in *Maislin*, the court of appeals reached the opposite conclusion. In light of *Maislin*, the petition for certiorari should be granted, the judgment vacated, and the case remanded to the Seventh Circuit for further consideration.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded to the Seventh Circuit for further consideration in light of *Maislin*.

Respectfully submitted.

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